

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

STANLEY ASSOCIATES, INC.

Employer

and

UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA (UE)

Petitioner

Case 1-RC-22171¹

DECISION AND DIRECTION OF ELECTION²

The Employer, Stanley Associates, Inc. has a contract with the federal government to receive and prepare the applications of individuals who apply for various services from the Department of Homeland Security U.S. Citizenship and Immigration

¹ On the same day that it filed the petition in this case, the Union filed three additional petitions covering various employees of Choctaw Archiving Enterprises, Northrop Grumman, and Federal Working Group, in Cases 1-RC-22172, 1-RC-22173, and 1-RC-22174, respectively, and I consolidated those four cases for hearing. As the Union and Choctaw Archiving Enterprises, Northrop Grumman, and Federal Working Group have entered into stipulated election agreements, I hereby sever Cases 1-RC-22172, 1-RC-22173, and 1-RC-22174 from this matter.

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Service. The Union seeks to represent various clerical employees employed by Stanley at the Citizenship and Immigration Service's Vermont Service Center in St. Albans, Vermont³ who are engaged in file maintenance and processing, including employees engaged in file maintenance, data entry employees, couriers, and mail room employees. Stanley maintains that the unit must also include three operational liaison specialists, about eighteen quality control employees, and a number of employees in the classification of subject matter expert (SMEs). The Union asserts that those three classifications should be excluded from the unit on the ground that they are technical classifications and/or do not share a sufficient community of interest with the unit employees to mandate their inclusion. The Union asserts, further, that the SMEs should be excluded from the unit as statutory supervisors.

I find that the SMEs are not statutory supervisors and that they share a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit. I find that the quality assurance employees and OLSs do not share a sufficient community of interest with the petitioned-for employees to mandate their inclusion in the unit.

FACTS

Stanley is the prime contractor with the federal government at the Vermont Service Center, and its contract began on December 3, 2007.⁴ Four other employers, Choctaw Archiving Enterprises, Northrop Grumman Technical Services, Inc. (Northrop Grumman), Federal Working Group, and DRC, are subcontractors of Stanley with respect to the same contract and also employ employees located at the Vermont Service Center.⁵ It appears that before Stanley took over the prime contract with the federal government, at least some of the Stanley employees were employed by a different contractor or contractors who performed similar work at the Vermont Service Center.

Organizational Structure:

Mark Stephens is the Employer's site manager at the Vermont Service Center, and Noel Induni is the deputy site manager. There are four assistant site managers at the Vermont Service Center: Mark Moye, the data entry manager; Sarah Vincent, who is in charge of mailroom operations, the N-400 data entry procedures, and the fee deposit procedure; Erin Duffy, who is in charge of file room operations; and Jennifer Lagasse,

³ The Vermont Service Center consists of five separate buildings, four of which are located in St. Albans.

⁴ Therefore, at the time of the hearing in this matter on January 8, 2008, Stanley had been operating at the Vermont Service Center for only about a month.

⁵ As previously noted, the Union and Choctaw Archiving Enterprises, Northrop Grumman, and Federal Working Group entered into stipulated election agreements. DRC employees were not the subject of any petition.

who is in charge of quality assurance. In addition, Kelly Robtoy, who was an assistant site manager/deputy site manager, is now acting temporarily as the site manager for the second shift.⁶

The Employer's Vermont Service Center location operates with a day shift and a night shift.⁷ The bulk of the Employer's employees at the Vermont Service Center⁸ are organized into teams that are each headed by one of twenty supervisors.⁹ There are two teams employed in mailroom operations, one on the day shift and one on the night shift; six teams in file room operations, four on the day shift and two on the night shift; and eight or nine data entry teams divided between the day and night shifts. The quality assurance employees, whose status is in issue, work on both the day and night shifts and report to quality assurance supervisors. Each team is composed of employees in the same general classifications,¹⁰ so that file room teams employ file clerks, data entry teams employ data entry employees, and mailroom teams employ mailroom employees and, perhaps, couriers.¹¹ The number of employees on each team varies; for example, one team has about fifteen employees while another has thirty.

⁶ It appears that Stephens is employed by Stanley. Moye, Vincent, and Lagasse are employed by Stanley. Induni and Duffy are employed by Northrop Grumman. The record does not reveal by whom Robtoy is employed. The parties have stipulated, and I find, that Moye, Vincent, Lagasse, Induni, Duffy, and Robtoy are statutory supervisors who should be excluded from any unit found appropriate.

⁷ The day shift employees work from 6 a.m. to 2:30 p.m. and the night shift employees work from 3 p.m. to 11:30 p.m.

⁸ Stephens testified that he oversees about 418 employees at the Vermont Service Center, which presumably includes statutory supervisors as well as employees of the subcontractors. The record does not reveal how many employees are in the petitioned-for unit of Stanley employees, although the petition itself reflects a unit of 134 Stanley employees.

⁹ The record does not indicate if there are 20 teams, i.e., one for each supervisor. There are currently 18 supervisors and there are openings for two more. The parties have stipulated, and I find, that the supervisors who head the teams are statutory supervisors who should be excluded from any unit found appropriate.

¹⁰ The employees of the subcontractors appear to be employed in the same classifications as the Stanley employees. The record does not reveal whether employees of Stanley and employees of the other subcontractors work together on the same teams, but it appears that they all report ultimately to the same supervisors. Thus, Assistant Site Supervisor Sarah Vincent supervises SMEs employed by Stanley, Choctaw, and Federal Working Group.

¹¹ Throughout the hearing, the parties also referred to the various Stanley employees by their designation as "adjudication support assistant" (ASA) 1, 2, or 3, which appear to be pay designations. Stephens testified that ASA 1 and ASA 2 each have a "data entry designation" and a "mail file designation." Teams may have a mixture of ASA 1s and 2s who perform the same function. Thus, the teams of data entry employees include ASA 1s and 2s. Stephens testified that there could be a team of ASA 1 and ASA 2 file employees, although currently all of the file

As previously noted, the Vermont Service Center consists of five buildings, four of which are located in St. Albans. Stanley employs employees who work in three of the buildings in St. Albans, including the Tabor Building at 75 Lower Weldon Street, and the Federal Building on Main Street, which are located one-tenth of a mile apart, and a building referred to as “Lemna 1,” which appears to be located nearby.¹² Stanley’s main operation is in the Tabor Building. Stephens testified that the “ASAs” are mixed up in the three buildings, although one of the three facilities has primarily data entry employees and no mailroom employees or file clerks.¹³ Employees in the three buildings have contact with each other by telephone and e-mail to coordinate work, but there is no physical contact between employees in different buildings, except when couriers move work between the buildings. It appears that the data entry employees work in rows of cubicles. The file clerks have work stations in an area that is hundreds of feet long.

The Unit Employees:

The petitioned-for employees are all involved in various steps of processing applications for various kinds of services from the Citizenship and Immigration Service. Each morning a mailroom employee and a courier drive a truck to the post office to pick up the mail. By 6 a.m., they have taken the mail to the Federal Building, where it is x-rayed. The mail is date stamped, separated, and distributed to various teams. The data entry employees put the mail in a certain order, enter data from the applications into a computer system supplied by the Citizenship and Immigration Service, generate a receipt notice for any fees associated with the applications, and scan a bar code associated with the receipt number, which is used as part of a computerized tracking system. The applications worked on by the data entry employees are then sent on to the file room employees, to auditors, or to “adjudicators.”

The data entry clerks are required to have a high school diploma or equivalent. The record does not reveal the qualifications required for the other petitioned-for

employees are ASA 1s. The Employer takes the position that it would include in the unit all ASA 1s, 2s, and 3s.

Of the disputed employees, SMEs are classified as ASA 2s, and the quality control employees are ASA 3s. The record does not reveal the ASA level of the operational liaison specialists. Stephens testified that the ASA 3 group is composed “almost exclusively” of quality assurance employees but did not explain what other classification of employees is included in the ASA 3 grouping.

¹² Only Northrop Grumman employees are employed at a warehouse in St. Albans called “Lemna 4” and a fifth building located 30 miles away in Essex Junction, Vermont.

¹³ The record does not reveal which of the three buildings has primarily data entry employees. There are four teams in the Federal Building, including mail room and data entry teams, five or six teams in the Tabor Building, and four teams at Lemna 1. If there are additional teams, the record does not indicate where they are located.

positions. It appears that the petitioned-for employees, as well as the SMEs, quality assurance employees, and OLSs are all hourly paid, receive the same benefits, and are subject to the same personnel policies. The record does not reveal the wages of the petitioned-for employees or of the employees in the disputed classifications.

Subject Matter Experts:

There are subject matter experts (SMEs) in each of the three buildings in which Stanley employees work. Each of the teams has an SME, and some large teams have two or three SMEs.¹⁴ The SMEs report to the same supervisor as the other employees on their team. Stephens testified that the SMEs are responsible for knowing the standard operating procedures for their team, helping with training, and bringing the employees on their team up to standards. They observe what the team members are working on and answer their questions. The record does not reveal the qualifications required to become an SME.

Jeremy Murray, an ASA 1 data entry operator in the “One Step” department, testified that there are fifteen to eighteen employees in his department, which is headed by One Step Supervisor Sarah Ovitt. Ovitt and SME Shannon Cross, who is sometimes referred to as the team lead or assistant supervisor, share an office with glass walls, while the data entry employees work in two rows of cubicles. Each day, Ovitt and Cross prepare a report that indicates the number of applications of various types that are pending. They then make a judgment as to how many employees to put on each job. Either Ovitt or Cross gives Murray his work assignments. Cross knows which employees are stronger at keying so that she knows that it might take one data entry clerk an hour to do the same work that it would take Murray two hours to complete. Cross drops work off at Murray’s cubicle, such as a crateful of 150 “765” forms, and tells him, for example, to get as many done as he can before 8 a.m., when he will switch to scanning work. If Murray is low on work, Cross may tell him to see if there is scanning work to do, or he may ask Cross if it is okay for him to switch from keying to scanning. Sometimes Murray’s computer system prompts him that a “supervisor code” is needed, such as when there is a discrepancy in a fee amount. Murray usually asks SME Cross to enter the code, which he does not know, into his computer. If there is a possibility that a check will not be acceptable, he asks Ovitt or Cross for permission to forward the check to the deposit room and puts a note on the check that Ovitt or Cross has approved it. At the end of the day, Ovitt or Cross produces a report that accounts for the checks and money orders processed that day and a breakdown of production by the hour. Murray testified that, on high volume days, both Ovitt and Cross do production work if nothing else is going on, because Stanley is penalized for not having all checks ready for deposit in one day. He estimated that Cross may spend 50 percent of her time doing production work. Cross attends their team meetings. The team takes lunch in two shifts, and Cross is “in charge” of those who are working while the rest of the team is at lunch and is also in charge when Ovitt leaves early.

¹⁴ The record does not reveal how many SMEs are employed by Stanley.

Employee Terry Dragon performs data entry work.¹⁵ Dragon worked in a data entry department at Lemna 1 for about two weeks after Stanley took over the contract on December 3, 2007. During that time, SME Kristy Duhamel was “in charge” on one day when Supervisor Lerinda Gabree was absent. Since Gabree left the employ of Stanley on January 3, 2008, the three SMEs on the team, Duhamel, Krissy Pouliot, and Reba Lemnah, “do everything the supervisor would do if she was there.”¹⁶ In mid-December, Dragon was temporarily transferred to another data entry team at the Tabor Building. At Tabor, Dragon’s supervisor is David Mills and her SME is Marsha Sweeney. Sweeney sits in the supervisor’s office and is in charge when Mills is out. Sweeney gives Dragon her assignments for the day, and if Dragon has any questions about her work, she asks Sweeney. Sweeney spends about half her time in the supervisor’s office.

With respect to the role of the SMEs in granting time off, Murray testified that Cross was the acting supervisor for the One Step Department at various times since the department was created four years ago, including two to three times in the last year. This was before Stanley took over the contract. When Cross was acting supervisor, Murray went to her with his requests for time off on more than one occasion. Cross would look at a book to see if there were open slots or too many employees taking that day off. She would then call another supervisor to say that Murray wanted the day off, that she had checked the book, and that the staffing levels were fine. She would then ask the other supervisor to sign off on the request for her. Dragon testified that when she needs time off, she asks her supervisor if he is there. If her supervisor is not present, she asks her SME, Sweeney, who tells her to go. The data entry employees fill out certain reports concerning their production and time that they turn in to their supervisor or SME to enter into the computer system.

SMEs play no role in discipline, promotions, or the evaluation process. Supervisors and SMEs have a key or access code that gives them access to the “fee” room, where petitions that include accompanying checks for application fees are kept. The petitioned-for data entry clerks can go into the fee room only if escorted by a supervisor or SME. At the end of the day, the supervisors or SMEs put checks for thousands of dollars in a safe to which the data entry employees do not have access. SMEs have access to certain parts of the Employer’s computer system to which the data entry clerks do not have access, such as inter-office mail and a drive that contains certain kinds of clarification memos. Dragon testified that SME Sweeney has access to personnel files, which are kept in the supervisors’ office.

¹⁵ She testified, however, that her job title is “ASA-1 file mail.”

¹⁶ The record does not reveal whether this is one of the supervisory vacancies that Stanley intends to fill and, if so, how long the three SMEs will function as acting supervisors.

Quality Assurance Employees:

There are twenty quality assurance employees who work at the Vermont Service Center, eighteen of whom are Stanley employees.¹⁷ As noted above, they report to quality assurance supervisors who, in turn, report to the assistant site manager for quality assurance. The quality assurance employees work on both shifts and in all three buildings, and sit in a separate quality assurance area. The quality assurance employees are required to have an associate's degree or, perhaps, a bachelor's degree.

The quality assurance employees are assigned to certain data entry departments where they check the files of the data entry employees for quality. Periodically, they go over to the work stations of the data entry employees, ask for a certain number of files, and take them away to check for errors. If they find a problem with a file, they give the file, along with a form that shows the error to be corrected, to a supervisor or SME, who brings it to the data entry employee for correction. In addition to checking files for errors, quality assurance employees prepare "helpful hints" that explain to the data entry employees how to handle anomalous situations.

The Employer has recently established an incentive program under which the data entry employees will receive a monthly bonus beyond their regular wages based both on their rate of production and on the quality of their work. The quality factor is to be measured by the number of "passed" lots, i.e., work sent to quality assurance that contains no errors, and "failed" lots, work sent to quality assurance that is returned with errors.¹⁸

Unlike the petitioned-for employees, quality assurance employees have access to the fee room, to interoffice mail, and to archived memos to which the petitioned-for clerks do not have access. The quality assurance employees do not attend the data entry team meetings.

Occupational Liaison Specialists:

Three occupational liaison specialists (OLSs) report directly to Stephens. Stephens testified that the OLSs work only out of the Tabor Building, but also testified that OLS Scott Smith has an office in the Lemna Building and comes over to the Tabor Building three or four times a week. All of the OLSs work on the day shift and have offices. The record does not reveal the qualifications required to become an OLS.

The duties of the three OLSs are different. OLS Marcy Stefaniak gathers information to produce daily, weekly, and monthly reports tracking applications and

¹⁷ DRC employs two quality assurance employees who are not the subject of any petition.

¹⁸ Stephens testified that the contractor prior to Stanley had a quality control program that was punitive. He wants to create a quality assurance program that focuses on feedback, training, and improvement rather than punitive action.

petitions, as required by the government. She also does troubleshooting when the Employer's "customer" has questions and helps Stephens obtain the information necessary to respond.¹⁹ Assistant Site Manager Sarah Vincent testified that Stefaniak has recently performed "ASA 1 or 2" work, but Vincent did not explain what the work was or how much time Stefaniak spent performing this work, and she did not know how often this will happen in the future.

OLS Shawn Briggs helps coordinate the "pick list" of individuals identified for interviews for citizenship at various locations on the eastern seaboard and ensures that the files are sent to the interview locations in time to be reviewed before the interviews. Stephens testified that he and Briggs and a few others have boxed up files and prepared them for shipment, which is work that is ordinarily performed by the file maintenance employees. The record does not reveal how frequently Briggs has done this work.

OLS Scott Smith is primarily involved in training. He helps the SMEs standardize their processes and updates the standard operating procedures used by all personnel. He also reviews files from an entity called the "case resolution unit" and calls it to "somebody's" attention when he finds problems with the files.

Vincent testified that the primary function of the OLSs is to identify efficiencies and ways to improve the process, that they do so by observing the ASA 1s, 2s, and 3s, and that they are out on the floor daily interacting with the teams. Stefaniak and Smith have contact primarily with the data entry employees, while Briggs is in contact primarily with the filing employees.

ANALYSIS

Subject Matter Experts:

The Union contends that the SMEs should be excluded from any unit found appropriate on the ground that 1) they are statutory supervisors; 2) they are technical employees and/or do not otherwise share a sufficient community of interest with the petitioned-for clerical employees to mandate their inclusion in the unit. I find that the Union has failed to meet its burden of demonstrating the supervisory status of the SMEs, that the record fails to establish that the SMEs are technical employees, and that the SMEs share a sufficient community of interest with the other unit employees to require their inclusion.

1. Supervisory status of the SMEs

The Union asserts that the SMEs are statutory supervisors because of their authority to assign work, their authority to responsibly direct employees, their role in

¹⁹ As an example of a task performed by the OLSs, they respond to short notice customer requests, such as a request by the Federal Bureau of Investigation to immediately pull the files of individuals in their data base who should not be given citizenship or visas.

approving time off, and their role as acting supervisors. I find, however, that the Union has failed to meet its burden of demonstrating that the SMEs are Section 2(11) supervisors.

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*²⁰

The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children’s Farm Home.*²¹ The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*²² The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*²³

In *Oakwood Healthcare, Inc.*,²⁴ the Board recently refined its analysis of the terms “assign,” “responsibly direct,” and “independent judgment” in assessing supervisory status. The Board announced that it construes the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. *Id.*²⁵

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person has “men under him” and if that person decides which job shall be undertaken or who shall do it, that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. For direction to be

²⁰ 273 NLRB 1677, 1689 (1985).

²¹ 324 NLRB 61 (1997).

²² 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

²³ 308 NLRB 101, 102 (1992).

²⁴ 348 NLRB No. 37 (2006).

²⁵ Slip op. at 4.

“responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps. *Id.*²⁶

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.*²⁷ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.” *Id.*

The Union asserts that the SMEs assign significant overall duties to unit employees in that they determine whether a clerk in the One Step department will perform scanning or data entry. I note at the outset that there is no evidence as to the nature of the assignments made by any SMEs other than one SME in the One Step department.²⁸ Assuming that telling a clerk to perform scanning work versus data entry work constitutes assignment to an overall duty, the record fails to demonstrate the One Step SME exercises independent judgment in making such assignments. First, the record indicates that the One Step supervisor and One Step SME together make a judgment as to how many employees to put on each job, so that it cannot be said the One Step SME acts free of the control of others. Second, the only evidence that some judgment is involved in making these assignments was data entry clerk Murray’s testimony to the effect that the SME knows which data entry clerks are faster at keying work. I find that this involves a degree of discretion that does not rise above the routine or clerical and is insufficient to demonstrate the requisite independent judgment.

The Union contends that the SMEs responsibly direct employees in that they determine which job shall be undertaken next and who shall do it, give instructions for proper performance, and provide training and guidance in showing employees how to perform the tasks assigned. This does not establish their authority to responsibly direct, where the record is devoid of evidence, as required by *Oakwood Healthcare*, that the

²⁶ Slip op. at 5-7.

²⁷ Slip op. at 8.

²⁸ Data entry clerk Dragon testified only that her SME gives her her assignments for the day without any further elaboration, and there is no evidence regarding the role of SMEs in the file room teams or mail room teams in assigning work to unit employees.

SMEs are held accountable for the performance of the employees on their team, such that some adverse consequence may befall the SMEs if the tasks performed by the employees are not performed properly.

Nor does the SMEs' role in granting time off establish their supervisory status. I decline to rely on evidence of SME Cross's role in granting time off on occasions when she performed as an acting supervisor for a previous employer, which has no bearing on the authority delegated to her by Stanley.²⁹ Dragon's testimony that her SME approves her time off requests when her supervisor is not present, without more, is not sufficient to demonstrate the SMEs exercise independent judgment in approving time off, in the absence of any evidence of the process or the factors she considers in approving such requests or any evidence as to the frequency with which she approves such requests in lieu of the team supervisor.

Finally, the fact that SMEs share offices with supervisors, have access to the fee room, safe, personnel files, and certain portions of Stanley's computer system, have authority to enter a "supervisor code" into the data entry system when necessary, and have authority to approve questionable checks, are all secondary indicia of supervisory authority which are insufficient by themselves to demonstrate supervisory status in the absence of evidence that the SMEs possess any of the primary Section 2(11) indicia. *Ken-Crest Services*.³⁰

The Union contends that, even if I find that not all the SMEs are statutory supervisors, I should find that SME Kristy Duhamel is a supervisor, because she holds herself out as an acting supervisor and has completely taken over the supervisory duties of former supervisor Lerinda Gabree. It is well established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. *Hexacomb Corp.*³¹ To the degree that the Union is contending that Duhamel should be excluded from the unit because she was acting supervisor for one day when the supervisor was absent, even assuming Duhamel was given the same authority as her supervisor on that occasion, I find that her assumption of supervisory duties for one day was too irregular and sporadic to form the basis of a supervisory finding. The Board has held that substituting for supervisors during vacation periods or other unscheduled occasions is irregular and sporadic and, therefore, insufficient to establish supervisory authority. *Hexacomb*

²⁹ I note, in any event, that the evidence does not establish that Cross used independent judgment or effectively recommended the approval of time off on those occasions. Thus, it appears that, in her department, a predetermined number of employees were allowed to take time off on any given day. There is no evidence that Cross played any role in determining that number, and her role in checking to see if there were sufficient open slots remaining to permit approval of a time off request does not rise above the routine and clerical.

³⁰ 335 NLRB 777, 779 (2001).

³¹ 313 NLRB 983, 984 (1997).

Corp.; ³² *Quality Chemical, Inc.* ³³ To the degree that the Union relies on the fact that Duhamel and the other two SMEs on her team became acting supervisors upon the permanent departure of their former supervisor, ³⁴ I find that the Union has failed to meet its burden of demonstrating their supervisory status, in the absence of evidence regarding the intended duration of their service as acting supervisors and the absence of specific evidence as to the scope of their supervisory authority. ³⁵

2. SME's community of interest with the petitioned-for employees

The Union additionally asserts that the SMEs should be excluded from the unit on the ground that they are technical workers and/or do not share such a community of interest with the unit employees that their inclusion is required. I find that the proper test for the inclusion of the SMEs (as well as the other disputed classifications) in the unit is their community of interest with the petitioned-for clericals. While the issue of the SMEs' technical status may have some bearing on their community of interest with other unit employees or lack thereof, the Board will not automatically exclude technical employees from units of other employees when their placement is in issue. *Hogan Manufacturing, Inc.*; ³⁶ *Virginia Mfg. Co.* ³⁷ Rather, the Board determines the unit placement of such employees based on all the factors relevant to a community-of-interest finding, such as regular contact with unit employees and the degree to which their jobs are functionally integrated into the basic production process.

It is well settled Board law that a union need not seek to represent the most appropriate unit or most comprehensive unit, but only an appropriate unit. *Transerv Systems*; ³⁸ *Morand Bros. Beverages Co.* ³⁹ The Board's procedure for determining an appropriate unit is to examine first the petitioned-for unit. If that unit is appropriate, the inquiry ends. If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties, but it also has the discretion to select an

³² *Id.*

³³ 324 NLRB 328, 331 (1997).

³⁴ It is unclear why the Union has singled out Duhamel, as the Union's witness testified that all three SMEs do everything the supervisor would do.

³⁵ I note that the Union is free to challenge the ballots of the three acting supervisors should it contend that, as of the time of the election, they have continued to serve as acting supervisors for a long enough period and under such circumstances as to render them ineligible to vote.

³⁶ 305 NLRB 806, 897 fn. 7 (1991).

³⁷ 311 NLRB 992, 993 (1993).

³⁸ 311 NLRB 766 (1993).

³⁹ 91 NLRB 409 (1950).

appropriate unit that is different from those proposed by the parties. The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for classifications. *Boeing Co.*⁴⁰ In deciding whether a unit is appropriate, the Board weighs various factors, including differences or similarities in the method of wages or compensation, hours of work, employment benefits, supervision, working conditions, job duties, qualifications, training, and skills. The Board also considers the degree of integration between the functions of employees, contact with other employees, and interchange with other employees, as well as history of bargaining. *Overnite Transportation Co.*⁴¹ The petitioner's desire as to the unit is a relevant consideration, though not dispositive. *Florida Casino Cruises.*⁴²

I find that the SMEs share a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit. In this regard, they share common immediate supervision with the unit employees on their teams. They have frequent, daily work-related contact with the petitioned-for employees, and their work is functionally integrated with that of the petitioned-for employees. While there is no evidence of any permanent transfers between the petitioned-for positions and the SME positions, it appears that there is temporary interchange, in that the one SME about whom there was substantial testimony, Shannon Cross, spends fifty percent of her time doing “production work.” The SMEs and the petitioned-for employees work the same two shifts, are hourly paid, share the same “ASA 2” pay classification as some of the petitioned-for employees, share the same benefits, and are subject to the common personnel policies.

The Union asserts that the SMEs are technical employees because their functions and skills are significantly more sophisticated than those of the unit employees. In this regard, it asserts that unit employees often ask the SMEs, who have broad “technical” knowledge, questions about how to proceed with their work, and that the SMEs are charged with training unit employees and bringing their work up to standard. This evidence falls far short of demonstrating that the SMEs are technical employees. Technical employees are defined as employees who do not meet the strict requirements of the term “professional employees” as defined in the Act, but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools, or through special courses. *Audiovox Communications Corp.*⁴³ There is no evidence that the SMEs are required to have any specialized training or degrees, and the mere fact that they are somewhat more knowledgeable about the essentially clerical work performed by the unit employees does not demonstrate that their work is technical in nature. Putting aside the issue of the SMEs’ technical status, which, as noted above, is not dispositive of their

⁴⁰ 337 NLRB 152, 153 (2001).

⁴¹ 322 NLRB 723, 724 (1996), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

⁴² 322 NLRB 857, 858 (1997), citing *Airco, Inc.*, 273 NLRB 348 (1984).

⁴³ 323 NLRB 647 (1997).

community of interest with the petitioned-for employees, I find that any differences in the duties and skill level of the SMEs, and the fact that they sit in an office with a supervisor rather than in a cubicle, are outweighed by the other community-of-interest factors cited above.

Stephens testified that Choctaw Archiving, Northrop Grumman, and Federal Working Group also employ SMEs and that the responsibilities of the SMEs employed by all four companies are the same. Noting that testimony, Stanley argues in its post-hearing brief that I should take notice of the fact that the Union entered into Stipulated Election Agreements with Northrop Grumman, Choctaw Archiving Enterprises, and Federal Working Group, in which the Union agreed to include the SMEs. I hereby take administrative notice of those Stipulated Election Agreements, but I decline to rely on them as a basis for my determination to include the SMEs. I note, for the record, that only the Agreement with Northrop Grumman expressly includes the SMEs, while the other two Agreements include the positions of “general clerk II” and “clerk II’s” but do not expressly include or exclude SMEs. In any event, it is the Board’s policy not to consider itself bound by a bargaining history resulting from a consent election in a unit stipulated by the parties rather than one determined by the Board. *Laboratory Corp. of America Holdings*.⁴⁴

Quality Assurance Employees:

Stanley maintains that the quality assurance employees are so fully integrated into its operations that they must be included in the unit. The Union asserts that the quality assurance employees are technical employees and that, even if it is determined that they are not technical employees, they do not share a community of interest with the petitioned-for clericals. I find that they should be excluded from the unit.

For the reasons explained above, the proper test for the unit placement of the quality assurance employees is their community of interest with the petitioned-for employees, and not their technical status. I find that the quality assurance employees do not share such an overwhelming community of interest with the petitioned-for employees as to mandate their inclusion in the unit over the objection of the Union. In this regard, they perform a different function from the unit employees and are required to have an associate’s or bachelor’s degree, unlike the high school education required of the unit employees.⁴⁵ They are separately supervised by quality assurance supervisors who, in turn, report to a quality assurance manager. They sit in a separate area. While there is some limited contact when quality assurance employees pick up files from data entry clerks for review, the record does not reveal how often this occurs. There is no evidence

⁴⁴ 341 NLRB 1079, 1083 (2004).

⁴⁵ Contrary to the Union’s assertion, the record does not support a finding that the quality assurance employees are technical employees. The fact that they are required to have an associate’s degree or, perhaps, a bachelor’s degree is, in and of itself, insufficient to demonstrate their work is of a technical nature that requires specialized training or courses.

that they have any contact with file room or mailroom employees. There is no evidence of any permanent transfers between the unit employees and quality assurance employees, nor is there any evidence of any temporary interchange between the two groups. Unlike the petitioned-for employees, the quality assurance employees are classified as ASA 3s, a higher pay grade.⁴⁶

In these circumstances, the Board has excluded quality assurance employee from units of production and maintenance employees.⁴⁷ In *Lundy Packing Co., Inc.*,⁴⁸ the Board excluded quality assurance/lab technicians from a petitioned-for production and maintenance unit, where the technicians were separately supervised, were paid differently from the petitioned-for employees, and had no interchange with the production and maintenance employees. Further, although the quality assurance employees performed some of the same functions as the petitioned-for employees, the majority of their functions, albeit related to the production process, were different from those performed by production and maintenance employees, contact was not so substantial and regular as to compel their inclusion in the unit, and no labor organization was seeking to represent a broader unit including the disputed employees.

Similarly, in *Penn Color*,⁴⁹ the Board excluded quality control and development technicians from a production and maintenance unit, where the petitioner did not seek to include them in the unit, despite common benefits and some contact, in view of their separate supervision, absence of interchange, option of being paid on a salaried basis, and different requirements regarding educational background and on-the-job training. See also, *Beatrice Foods*⁵⁰ (quality control employees who test samples of products excluded from a unit of production and maintenance employees where they are separately located, under separate supervision, and do not have regular contact with production employees).

Keller Crescent Co.,⁵¹ cited by the Employer, is distinguishable. In that case, the Board approved the inclusion of three quality assurance monitors in a production and maintenance unit, despite their separate supervision and separate departments, noting that quality control is a vital part of the production process. Unlike the instant case, the quality assurance monitors in *Keller Crescent Co.* had regular, daily contact with

⁴⁶ In reaching the conclusion that the quality assurance employees should be excluded, I do not rely on the evidence concerning their role in the unit employees' incentive program.

⁴⁷ Since the business of this employer entails clerical work exclusively, I find that clerical work is the "production" work in this employment setting, and that the cases that deal with the inclusion or exclusion of quality control employees from production and maintenance units are instructive.

⁴⁸ 314 NLRB 1042 (1994).

⁴⁹ 249 NLRB 1117, 1119-1120 (1980).

⁵⁰ 222 NLRB 883 fn. 3 (1976).

⁵¹ 326 NLRB 1158 (1998).

production employees, as they spent 95 percent of their time on the production floor, where they worked alongside the production employees. The production employees frequently conferred with the quality assurance monitors and used some of the same equipment. There could be transfers between production and quality assurance positions, and at least one of the three quality assurance monitors had transferred from a production position. Quality assurance monitors also performed production work on an as needed basis when the employer was shorthanded or the production employees needed to be relieved.

Further, in representation cases, the unit sought by the petitioning union is always a relevant consideration. *Lundy Packing Co.*⁵² In excluding the quality assurance employees in *Lundy Packing Co.*, the Board noted that it was not unmindful that the Board has generally included quality control employees in production and maintenance units when a union has requested them, that a unit including these employees might also have been appropriate had the petitioner sought such a unit, but that the disputed employees did not share such an overwhelming community of interest as to require their inclusion. In *Keller Crescent Co.*, unlike the instant case, the petitioning union sought to include the quality insurance monitors.

Other cases relied on by Stanley do not warrant a different result. The Board specifically noted in *Lundy Packing Co.*⁵³ that *Kellogg Switchboard & Supply Co.*⁵⁴ and *Ambrosia Chocolate* (referred to by the Board as *W.R. Grace & Co.*),⁵⁵ in which the Board included quality control employees over the petitioners' objections, were decided prior to the Board's decision in *Penn Color* and, therefore, have diminished precedential value. In *Libby Glass Division*,⁵⁶ unlike the instant case, the petitioning union sought to include quality control employees in a production and maintenance unit, and they spent 60 percent of their time on the production floor, where they had substantial contact with production and maintenance employees.

Operational Liaison Specialists:

Stanley contends that the OLSs' community of interest with the unit is sufficient to require their inclusion. The Union contends that the OLSs should be excluded as technical employees and that, even if they are not found to be technicals, they do not share a community of interest with unit employees and their interests are so intertwined with management that they should be excluded. For the reasons set forth above, I find

⁵² *Supra*, 314 NLRB at 1043.

⁵³ *Id.* at fn. 9.

⁵⁴ 127 NLRB 64 (1960).

⁵⁵ 202 NLRB 788 (1973).

⁵⁶ 211 NLRB 939, 940-941 (1974).

that the proper test for the inclusion of the OLSs is their community of interest with the petitioned-for employees rather than their technical status,⁵⁷ but that the OLSs' community of interest with unit employees is not sufficient to compel their inclusion.

Although the OLSs are hourly paid, like the unit employees, receive the same benefits, and are subject to the same Employer policies, these factors are outweighed by other factors that militate against including them in the unit. Thus, the OLSs are separately supervised from the unit employees, in that they report directly to Site Manager Mark Stephens. They perform different duties from the unit employees, such as preparing reports, training, and coordinating the "pick list." There is no evidence of any permanent transfers between OLS and unit positions. There was some evidence of temporary interchange, in that OLS Stefaniak has performed some unspecified unit work and OLS Briggs has boxed up some files, which is unit work, but the record does not reveal the frequency with which this has occurred or is expected to occur in the future. While there was general testimony that the OLSs have contact with unit employees and interact with them, the record does not reveal the precise nature of their interaction. In these circumstances, and noting that the Union does not seek to represent the OLSs, I find that their community of interest is not so overwhelming as to mandate their inclusion in the unit.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time clerical employees engaged in file maintenance, data entry operations, mail room operations, and courier operations, and all subject matter experts, employed by the Employer at U.S. Bureau of Citizenship and Immigration Services Vermont Service Center located in St. Albans, Vermont, but excluding quality control employees, occupational liaison specialists, professional employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible

⁵⁷ I find, in any event, that the record does not support a finding that the OLSs are technical employees. The Union argues that the OLSs are technicals because they prepare reports of a "technical" nature, help standardize the processes of the SMEs, update standard operating procedures, and monitor the "pick list," tasks which are complex and require sophisticated skills and independent judgment. Contrary to the Union's assertion, there is no evidence that the reports are "technical" in nature, nor is there evidence that any of the other duties of the OLSs are technical in nature. The record is also devoid of evidence that OLSs are required to have specialized degrees or training.

to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by United Electrical, Radio and Machine Workers of America (UE).

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*,⁵⁸ *NLRB v. Wyman-Gordon Co.*⁵⁹ Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.⁶⁰ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before February 1, 2008. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W.,

⁵⁸ 156 NLRB 1236 (1966).

⁵⁹ 394 U.S. 759 (1969).

⁶⁰ 315 NLRB 359 (1994).

Washington, DC 20570. This request must be received by the Board in Washington by February 8, 2008.

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 1st day of February, 2008.